Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Implementation of Section 621 (a) (1) of the Cable Communication Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	§ § § §	**MB Docket No. 05-311** **FCC 05-189**

TEXAS COALITION OF CITIES FOR UTILITY ISSUES' ("TCCFUI") REPLY COMMENTS ON CABLE FRANCHISING NPRM

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TEXAS COALITION OF CITIES FOR UTILITY ISSUES REPLY COMMENTS ON CABLE FRACHISING NPRM

COMES NOW the Texas Coalition of Cities for Utility Issues (Referred to as "TCCFUI"[1]) and files these Reply Comments in the Federal Communications Commission (hereinafter "FCC" or "Commission") Notice of a Proposed Rulemaking concerning cable television franchising under Section 621 (a) (1) of the Cable Communication Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992. ("Cable Franchising NPRM").[2] As stated in TCCFUI's filed Comments, the Cable Franchising NPRM posed, in essence, two question (to paraphrase): 1.) Are local franchising authorities unreasonably refusing to award additional competitive cable franchises, and if so, 2.) have cable providers documented such refusals? [3] After a review of the filed comments by the telephone industry, the cable industry and a substantial number of the thousands of comments by city and other municipal organizations and associations, the clear answer to both of those questions is "No".

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[1] Attached as Exhibit A to the initial TCCFUI Comments was a representative list of City members of TCCFUI.

[2] *In the Matter of implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992,* MB Docket No. 05-255, Notice of Proposed Rulemaking (released November 18, 2005).

[3] Cable Franchising NPRM ¶ ¶ 12, 13.

There was a specific request in the Cable Franchising NPRM that "[parties] should present empirical data on the extent to which LFAs unreasonably refuse to award competitive franchises. We seek record evidence of both concrete examples and broader information that demonstrate the extent to which the problem exist."[4] Contrary to this specific request by the Commission, the commenters, primarily telephone industry commenters, ignored the Commission's request and did not provided any empirical data or concrete evidence, other than a few isolated–and frequently unidentified examples, that LFAs unreasonably refuse to award competitive franchises.[5]

While the Cable Franchising NPRM questions as posed were a challenge for cities to prove a negative, the city comments did just that. Cities in Texas and across the country have shown with example after specific example, that they not only did not unreasonably refuse to award additional competitive cable franchises, but encouraged such competition, even to the extent of risking litigation from incumbent cable providers. TCCFUI clearly established that in Texas, before September 1, 2005, such refusals did not occurred, nor can they occur post- September 1, 2005 due to the new state-issued cable and video franchise legislation enacted last year in Texas.[6] There was no evidence at all provided by any Commenters that Texas cities have unreasonably refused to grant an additional competitive franchise before or after September 1, 2005, the effective date of the 2005 Texas Cable Franchising Statute.

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[4] Cable Franchising NPRM ¶ 13.

[5] This was also a flagrant violation of Commission Rules which require local communities to be identified and served with pleadings to allow those local communities an opportunity to respond when preemption is being requested 47 C.F.R. § 1.1204 (b). See Note 4 to paragraph (b). Discussed *supra.*

[6] CHAPTER 66, TEXAS UTILITY CODE (Supp. 2005), on state-issued cable and video franchise ("2005 Texas Cable Franchising Statute"). Attached as Exhibit A is a summary of the key provisions in 2005 Texas Cable Franchise Statute.

I. OVERVIEW of REPLY COMMENTS

The Cable Franchising NPRM specifically addresses the implementation of Section 621(a) (1), as added in 1992.[7] The provision at issue reads: "**A franchising authority . . . may not *unreasonably refuse* to award *an additional* competitive franchise.** [Emphasis supplied]."[8] TCCFUI's filed Comments demonstrated how Texas municipalities have frequently, and timely, awarded additional competitive cable franchises in the face of scant and unsubstantiated general anecdotal allegations that additional competitive franchises have been unreasonably refused in Texas during the fourteen-year period since the enactment of the 1992 Cable Act.

Texas municipalities have encouraged and sought additional competitive cable providers during the last fourteen years, not only because additional competitive cable providers may keep cable rates lower for the local community, but because they may also enhance customer service among the competitors. When subscribers have a choice, service calls are answered more promptly, installation windows are shorter and are more often met, and programming is more expansive than if there were no competing providers. Municipalities in Texas share the Commission's view that such benefits may flow from the competitive pressures of additional franchises in a city.

As was shown in the filed Comments of TCCFUI, for over twenty years the cable franchising process as laid out in the 1984 Cable Act has worked very well in Texas.[9] In Texas, and as city Commenters in other parts of the country noted, if there has been any delay or refusal to award a cable franchise, it has largely arisen due to actions of parties other than the city acting as the local

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[7] Now codified as 47 U.S.C. § 541 (a) (1) this provision was added in 1992 through the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Stat. 1460 (the "1992 Cable Act'). 47 U.S.C. § 521, *et seq.*, as amended to 1996, sometimes referred to as the "Cable Act", herein.

[8] 47 U.S.C. § 541(a) (1).

[9] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, codified as 47 U.S.C. § 521, *et. seq.* (The "1984 Cable Act").

franchising authority in the negotiations. While it is axiomatic that in any negotiations, there are at least two parties (in this case the local franchising authority and the prospective competitive cable provider), as was noted in the Comments of both Verizon and BellSouth, frequently the incumbent cable provider interjects itself into the process essentially demanding to have a place at the negotiation table so they can advance arguments on any "objectionable" provisions from the incumbent cable provider's perspective (i.e. that could "raise the bar" at the time the incumbent's franchise expires) and "insisting" that any new franchises mirror the incumbent's franchise.[10] The cable franchising process can be delayed by such requests of the incumbent. On the other hand, prospective competitive cable providers have on occasion demanded unreasonable terms or failed to agree to reasonable terms, exposing the local franchising authority to the incumbent's claims of discriminatory franchising. These tactics, by the incumbent cable providers and by the telephone company new entrants combined, can and do significantly delay the local cable franchising process. As noted in the initial TCCFUI Comments, Texas was one of the first states in the nation to enact a new, streamlined statewide cable and video franchising process by the adoption of the 2005 Texas Cable Franchising Statue.[11] The Comments by the Public Utility Commission of Texas demonstrate the ease and timeliness of franchises now being granted in Texas, including franchises to both incumbent local exchange carriers, such as Verizon and AT&T but also incumbent cable providers whose franchise had expired, such as Time Warner, Charter and Cox, along with over builders like Grande Communications.[12]

II. TCCFUI'S SUPPORT OF OTHER CITY AND MUNICIPAL ASSOCIATIONS COMMENTS.

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[10] Comments of Verizon on Video Franchising ("Verizon Comments"), page 28. Verizon characterized the incumbent cable providers as being "engaged in ground warfare."; Comments of BellSouth ("BellSouth Comments"), page 44-45.

[11] Attached as Exhibit A is a summary of the key provisions in 2005 Texas Cable Franchise Statute.

[12] *See* Comments by the Public Utility Commission of Texas ("PUCT Comments").

A. The Commission lacks Jurisdiction to promulgate Rules to Construe or Enforce Section 621 (a) (1).

The Cable Franchising NPRM inquires whether the Commission should establish procedures and other requirements concerning the awarding of franchises.[13] TCCFUI would agree and adoption by incorporation the legal analysis put forth by a number of Commenters that the Commission wholly lacks the legal authority to promulgate rules or to enforce Section 621 (a) (1).[14]

To the extent the Commission concludes it does have jurisdiction in this matter, which TCCFUI does not agree that it has, TCCFUI would urge that should the Commission establish any such procedures or requirements, that the Commission must ensure that any such procedures or requirements do not reduce or otherwise diminish the standards established in the 2005 Texas Cable Franchise Statute. The 2005 Texas Cable Franchise Statute standards are reasonable and clear and they apply statewide, and they meet the Commission's tentative criteria for reasonableness.[15] At a minimum, the standards in the 2005 Texas Cable Franchise Statute provide threshold standards for any franchising process that may be lawfully established by the Commission.[16]

B. No Credible Evidence has been Provided that Demonstrates that LFAs Have Unreasonably Refused to Grant Competitive Franchises.

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[13] Cable Franchising NPRM, ¶ 21.

[14] Comments of the National Association of Telecommunication Officers and Advisors, The National League of Cities, The National Association of Counties, The U.S. Conference of Mayors, *et al.* at pages 4-21 and 30-37 ("NATOA Comments"); Comments of the Michigan Municipal league, *et al.*, at pages 3-28 ("Michigan Comments"); Comments of the ADA Townships, et al, at pages 4-7; Comments Submitted by Certain Florida Municipalities, pages 6-19 ("Florida Comments"); Comments of the National Cable & Telecommunications Association, pages 19-29 ("Cable Association Comments"); Comments of Comcast, pages 26-40 ("Comcast Comments").

[15] Cable Franchising NPRM, ¶ 20.

[16] See attached as Exhibit A for a summary of the key provisions in 2005 Texas Cable Franchise Statute.

TCCFUI in its initial Comments provided several city specific examples of how Texas cities have not refused to award additional cable franchises, unreasonably or otherwise. As was shown, in large urban communities across Texas, such as Arlington, Austin, Dallas, Houston and Irving, competitive cable franchises were negotiated in a timely manner and awarded. From the other filed Comments it was clear Texas cities were not unique in awarding additional competitive franchises. TCCFUI would commend the Commission to note that across the country this has been the case.[17] Additional cable franchises can and are negotiated in a timely manner when all parties participate reasonably. TCCFUI would agree with the other Commenters as to the ease by which a cable franchise may be obtained—when all parties are reasonable and are not requesting favorable treatment.[18]

TCCFUI suggests that all the concrete evidence to date is that cities have not unreasonably refused to award additional cable franchises. Instead, they have developed a record of cooperative, expeditious, good faith negotiations to bring competitive providers into the local marketplace.

C. No Credible Evidence has been Provided that Demonstrates that LFAs Have Demanded Unreasonable Terms in Franchises.

There was not one specific concrete example of any Texas city unreasonably refusing to award a franchise. Not one! Texas cities have not demanded unreasonable terms in cable franchises. As was shown, in large urban communities across Texas, such as Arlington, Austin, Dallas, Houston and Irving, competitive cable franchises were negotiated in a timely manner and awarded largely patterned

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[17] Michigan Comments, at page 63-64; City of Ft. Worth Comments, page 1-4; City of St. Louis Comments, page 16-34; Comments of Missouri National Association of Telecommunication Officers and Advisors, page 11-28, and exhibit 1 and 2; Comments of League of Minnesota Cites, *et al.*, page 6-7 and Exhibit B and C ("Minnesota Comments"); Florida Comments, page 22-24. See also Cable Association Comments, 1-12; Comcast Comments, page 7-21.

[18] *Id.*

on the incumbent provider's franchise. From the other filed city comments it was clear that those cities did not impose unreasonable standards or terms in franchises.[19]

TCCFUI suggests that all the concrete empirical evidence presented to date is that cities have not demanded unreasonably terms in cable franchises.

III. TCCFUI'S REPLY TO TELEPHONE INDUSTRY COMMENTS.[20]

A. Failure to name or notify local governments of allegations must have consequences.

At the outset it should be noted it appears that several commenters in this Rulemaking not only did not serve any accusatory pleadings on local and state governments as required when preemption is requested, but in many instances the comments did not even name the local government being accused of "wrong doing", which would at least afford that local government an opportunity to reply to the allegations.[21] While it is not clear the extent to which 47 C.F.R. § 1.1204 (b) applies to a Commission

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[19] Michigan Comments, at page 45-62 and Appendix A; City of Ft. Worth Comments, page 3-5; City of St. Louis Comments, page 36-37; Comments of Missouri National Association of Telecommunication Officers and Advisors, page 28-34 ("Missouri NATOA Comments"); Minnesota Comments, page 17-18;.

[20] The lack of Commission jurisdiction, rebutting the assertions by the various telephone industry commenters, and the Cable Act requirement of a cable franchise to provide cable services are address elsewhere in these Reply Comments.

[21] Verizon Comments, with rare exception, do not name the local communities it asserts have acted either unlawfully or unreasonably, although a state may be named. The Verizon filing is replete with general, unsubstantiated allegations i.e. "one Virginia community", page 6, , "some LFAs", page 6, , "communities in California", page 7, "one county in Florida", page 32, "one Texas community", page 41, While the Verizon Comments are "supported" by Declarations which imply more specificity, they rarely supply that specificity, O'Donnell Declaration, "one Virginia community", page 8, "one county in Florida", page 9, , "California", page 9, "Texas", page 11.; AT&T Comments are even more vague, not only do they not name local communities, they make unsubstantiated general allegations that "ad hoc coalitions or working groups of municipalities" are "fostering a race to the bottom...to create even more onerous conditions on entry." Comments of AT&T, page 29 ("AT&T Comments"). As AT&T did not name these "ad hoc coalitions" (not unlike the unnamed "fellow travelers" in another era), these unsubstantiated harangues of AT&T should be stricken and given no weight in this proceeding; *But see* BellSouth Comments, unlike AT&T Comments and Verizon Comments, BellSouth Comments did at

initiated Rulemaking as opposed to a party initiated Rulemaking that may have preemptive effect on local governments, the requirements of the rule should be followed to allow any local government to have adequate notice and an opportunity to respond to accusations of wrongdoing.[22] To do otherwise would allow any self-serving statement to be made without challenge of its veracity, and thus any rule ultimately adopted by the Commission would be founded on those unchallenged, unsubstantiated self-serving statements that were not tested in the crucible of the adversary system. At the very least, if a local government has not been identified, the pleadings should be stricken and given no weight, and if local communities were named but not served, they should be stricken unless there were filed comments by the named community.

B. Reply to incumbent telephone provider's comments.

As with any bargaining process, the length, cost and ultimately the efficiency of the negotiations depends on the extent to which each party participates in reasonable, good faith negotiations. For those entities that do not want to comply with existing law—or even apply for a franchise-should not be allowed to complain of that process in this rulemaking.

As has already been noted, in several of the filed comments by members of the cable industries, the initiation of this project has largely arisen due to the unsubstantiated complaints of the cable franchising process by the incumbent telephone industry.[23] For instance, in the Cable Association Comments they state that the telephone companies' comments are just "self-serving".[24] The Cable

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least name the local governments it complained of in its Comments, although it must be verified that those pleadings were served on the named local communities to allow them to respond. Otherwise those comments should be stricken also.

[22] 47 C.F.R. § 1.1204 (b). *See* Note 4 to paragraph (b) on required service of the pleadings on the local community, required the naming of local governments with sanctions for failure to do so in petition for Rulemaking or other preemptive matters.

[23] Cable Association Comments, page 2; Comcast Comments, page 1; Comments of Cablevision Systems Corporation, page, 2, ("Cablevision comments"); Comments of Charter Communications, Inc., page 1-3, ("Charter comments").

[24] Cable Association Comments, page 2.

Association also suggests that "all evidence suggests that telephone companies are applying for – and having a little trouble obtaining – franchises from state and local governments."[25] Cable Association continues that the telephone companies only want to "cherry pick" to serve "high" value customers leaving the cable incumbents serving what the telephone company terms "low value" customers.[26]

Comcast Comments further state "[c]ontrary to vague and unsubstantiated claims made by the ILECs in the video competition proceeding and referenced by the Commission in the *Notice*, *ILECs that want franchises are having little or no difficulty obtaining them.*" [27]

In Cablevision's Comments, they devote entire sections complementing local franchising authorities on reasonably awarding franchises in a timely manner and castigating the incumbent telephone companies in their failure to obtain franchises due to their own conduct, i.e. "States and localities already promote competitive franchising",[28] "Any problems or delay from cable franchising experienced by Verizon and AT&T are largely of their own making",[29] and "The evidence suggest that it is Verizon, and not local governments, that is unwilling to abide by reasonable franchise terms."[30] In each section Cablevision provides details to support those section titles. They also provide specificity as to the number of franchises which in fact have been obtained both by cable operators and by those telecommunication companies which have actually applied for franchises.

Reply as to Verizon Comments:

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[25] *Id.*

[26] *Id.*, page 15 and 16 respectively.

[27] Comcast Comments, page 8. Italics in original.

[28] Comments of Cablevision Systems Corporation, page 9. ("Cablevision Comments").

[29] *Id.* At page 12.

[30] *Id.* At page 14.

Verizon in particular has filed comments that are both ripe with hyperbole but low on any empirical data or specific concrete examples. For instance, the Verizon Comments state "Moreover, in some cases incumbents and LFAs have taken the extreme position that Verizon must serve customers who live completely outside of its telephone service area where it has no facilities at all."[31] Clearly it is not extreme to require that a cable provider serve all residential communities and households within the franchised area. That requirement is permitted and has been permitted by the Cable Act for over 20 years. To characterize it as "extreme" says more about Verizon, as the commenter, than about the requirement. To require cable service to all households in an area is consistent with the Commission's tentative conclusions of franchise terms that are reasonable, based on the provision in the Cable Act that provides a franchising authority must allow a franchisee "a reasonable period of time to become capable of providing cable services."[32] What Verizon really is complaining of is that Verizon just does not want to apply for cable franchises under current law. Of course Verizon has historically applied for franchises, at least in Texas, for decades, to provide telecommunication services and only recently (since 1999) has that not been the case.[33] What Verizon is complaining about in its Comments is essentially going through any local franchising process. They just do not want to comply with the Cable Act. To provide cable service, it requires a local cable franchise. Verizon cannot change the law by use of the Commission in this Rulemaking by construing (or rather misconstruing) the provision prohibiting unreasonable requirements for any additional competitive franchise.

Reply as to AT&T Comments.

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[31] Verizon Comments, page 7.

[32] 47 U.S.C. § 541(a)(4)(A).

[33] This was due to a change in state law in 1999, as is discussed in detail in the initial Comments of TCCFUI. *See* Texas Loc. Gov't Code Ann. Chapter 283, § 283.001, *et. seq.* (Supp. 2005) ("Texas Chapter 283").

AT&T Comments are probably even more baffling, in the sense that AT&T has taken the self-servingly legal position that as they do not need a cable franchise and thus they have not applied for any, except in Texas.[34] Yet, in this rulemaking, which AT&T asserts would not apply to them if their legal argument is correct, AT&T has filed almost 100 pages of comments in this proceeding concerning cable franchising.[35] From the sheer volume of AT&T's Comments it becomes clear that even AT&T recognizes the weakness in their "need no cable franchise" argument in that what they are providing is a "cable service" irrespective that part of the transmission link in providing that service is via the Internet. What is regulated by the Cable Act is "cable service", not the delivery technology, so long as the "cable service" is delivered using the public rights-of-ways, which AT&T does do. AT&T intends to provide a "cable service" and before they do so they are required to have a cable franchise. Again, like Verizon, AT&T is complaining about the need to obtain a local cable franchise as required by federal law. And again, they cannot change that cable franchising requirement by asking the Commission to, in effect, negate federal law. The main complaint of AT&T seems to not be about cities granting franchises, which, like Verizon, they have obtained for decades when they were required to have one in Texas for telecommunication services, as is discussed above, but their complaint is about the cable franchising process and the incumbent cable providers role in that process.

AT&T Comment's state that the "[c]able industry devotes enormous resources to exploiting the current franchising process in order to delay competitive franchising proceedings, to impose

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[34] AT&T applied for a "video service provider franchise" at the PUCT due to the 2005 Texas Cable Franchise Statute applying to a "video service provider" using any delivery technology, including Internet protocol. Section 66.002, (10) "video service" "means video programming . . . without regard to delivery technology, including Internet protocol technology." and (11) "video service provider" "means a video programming distributor that distributes video programming . . . without regard to delivery technology."

[35] AT&T "doth protest too much, me thinks." W. Shakespeare, *Hamlet,* Act III, scene ii, line 239.

burdensome conditions on competitors, and to keep the conditions of a granted franchise in doubt through continuing litigation and legislative lobbying."[36]

AT&T discusses at some length in its comments that a cable franchise is not needed because they have an existing franchise.[37] AT&T suggests that as they already have authority to be in the right-of-way, they do not need a separate cable franchise to provide a different service, cable service. Using that same logic, AT&T may next arguer that if they wanted to provide electric distribution services or broadband over power lines ("BPL"), those uses would also be allowed under the same theory that they are already in the rights-of-way. Of course they need a franchise to provide electric service and they would need a franchise to provide cable services. They seem to ignore two hard facts--that their existing franchises or right to use the rights-of-way is for a limited purpose and federal law (and in Texas, state law) requires a separate franchise to provide cable service. The limited purpose for which AT&T is presently authorized to use the public rights-of-way in Texas is to provide "telecommunication services", not to provide cable services.[38] The Cable Act is quite clear that to provide "cable services" you must have a cable franchise.[39] AT&T cannot avoid these two facts in this forum. In fact in Texas under the guise of a "telecommunications services" upgrade both AT&T and Verizon have taken advantage of their right to use the public rights-of-way under Texas Chapter 283 to install the fiber upgrades which also allows them to distribute the video programming transmissions. So at least in Texas, there has been no delay in the installation of the cable services infrastructure in the public rights-of-way due to this self-styled "telecommunications services" upgrade which has gone forward pursuant to Texas Chapter 283.

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[36] AT&T Comments, Page 19.

[37] *Id.*, page 74-80

[38] Texas Chapter 283.

[39] 47 U.S.C. § 541(b) (1).

Reply as to BellSouth Comments:

While BellSouth at least has some specificity in the cities that it list where it is obtaining franchises, if the named cites were not given notice of the claims against them, the BellSouth Comments should be stricken and given no weight, as discussed *supra*.[40] Again, it seems to TCCFUI that the primary thrusts of BellSouth Comments, just like Verizon and AT&T (detecting a pattern?), is that they do not want to apply for a cable franchise and do not want to have a cable franchise on the similar terms as the incumbent. How they deem that consistent with the Cable Act or fair is beyond understanding. BellSouth should be required to meet the same requirements that a "traditional" cable provider has met for years under the Cable Act, nothing more and nothing less. The Cable Act is quite clear that to provide cable service you must have a cable franchise. Again, BellSouth cannot avoid that federal law franchise requirement by use of this forum.

TCCFUI would suggest that both the incumbent telephone provider and the incumbent cable provider have prolonged cable franchise negotiations. The incumbent telephone provider by wanting franchises on significantly different terms than the incumbent cable provider's franchise, and if that is done, it is prolonged by the incumbent cable provider threatening cities to litigate such franchises as they want nothing less than mirror image franchises. TCFFUI suggest a "plague o' both [their] houses!"[41] Both should have to comply with what federal law requires. The cable industry does not like it, but has lived with it for decades, and, as acknowledged in their comments, have accepted the Cable Act franchising process as reasonable and workable. The telephone industry must do the same. As has been shown in the comments by TCCFUI and by other city commenters, when both parties are

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[40] 47 C.F.R. § 1.1204 (b). *See* Note 4 to paragraph (b) on required service of the pleadings on the local community, required the naming of local governments with sanctions for failure to do so in petition for Rulemaking or other preemptive matters.

[41] W. Shakespeare, *Romeo and Juliet*, II, i, 94.

reasonable as to the terms of the franchise, particularly as is gauged by what the incumbent provides, franchises can be granted quickly.

IV. THE FCC CANNOT NEGATE THE STATUTORY REQUIREMENT OF 47 U.S.C. § 541(B) (1) TO OBTAIN A CABLE FRANCHISE FOR THOSE ENTITIES THAT HAVE A PRIOR, BUT LIMITED RIGHT TO USE THE RIGHTS-OF-WAY.

The Cable Act has provided since 1984 that "...a cable operator may not provide cable service without a franchise."[42] A franchise may only be granted by a granted by the franchising authority. "Franchising authority" is defined as "any governmental entity empowered by Federal, State, or local law to grant a franchise."[43] The Commission has not been granted any authority to negate the statutory requirements to allow cable service to be provided without a separate cable franchise, as is required by the Cable Act.

There is an erroneous assumption embedded in one of the Commission's inquiries where it asserts that the "the primary justification for a cable franchise" is "the locality's need to regulate and receive compensation for the use of public rights-of-way" which would be met by those "entities that already have franchises that authorize their use of the rights-of-way."[44] This statement has two fallacious assumptions. The primary justification a cable franchise is *not* as described by the Commission, and the *prior authority to use the rights-of-way is almost certainly limited* and not for any and all uses. As TCCFUI noted in its initial Comments, if an entity has been granted the right to use the public rights-of-ways, it is not carte blanc to be used "at will" for any and all purposes, even if otherwise lawful. That right to use was granted for a limited purpose and typically for Verizon and

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[42] 47 U.S.C. § 541(b) (1).

[43] 47 U.S.C. § 522(10).

[44] Cable Franchising NPRM ¶ 22.

AT&T, for telecommunications purposes[45], which is mutually exclusive from "cable service", in the statutory definitions of the Cable Act. And the compensation scheme for that limited use of the rights-of-way would be consistent with that limited purpose. Further under the Cable Act a cable franchise is where a city may require any institutional network ("I-Net") capacity and/or any public, educational and governmental access channel ("PEG") requirements to be met and any other requirements unique to the provisioning of cable service in a local community. [46] These cable related requirements would not be in a telephone franchise. In Texas this requirement for a separate cable franchise is also addressed in the2005 Texas Cable Franchise Statute.[47]

The Commission further inquires whether 47 U.S.C. Sec. 541 (a)(1) authorizes the Commission to have a different and higher standard of "reasonableness" that franchising authorities must meet as to entities with preexisting franchises (or other authority) to use the public rights-of-way that now want to provide cable services. This inquiry seems to assume or imply authority of the Commission to establish not only a lesser standard for those entitles already in the public rights-of-ways, but authority by the Commission to allow the provision of cable services without a franchise. This the Commission cannot lawfully do, as discussed *supra*.

Not only can the Commission not bypass or diminish the requirement for a cable franchise as required in the Cable Act, it cannot reduce the compensation of a cable provider to less than its fair

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[45] *See* TEXAS CHAPTER 283. § 283.052 (a) (1) "to provide telecommunications services".

[46] 47 U.S.C. § 541(a) (3) (no income discrimination in providing service); 47 U.S.C. § 541(a) (4) (A) (allow a cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area.); 47 U.S.C. § 541(a) (4) (B) (require adequate assurance that the cable operator will provide adequate public, educational, and governmental channel capacity, facilities or financial support).

[47] No cable services may be provided without a state issued franchise unless there is an existing municipal cable franchise. 2005 Texas Cable Franchising Statute, Section 66.003(a).

market value in Texas, as was detailed in the initial Comments of TCCFUI.[48] In fact as the minimum of 5% of gross revenue is set by federal law[49], that cannot be reduced by the Commission.

TCCFUI asserts that just as Congress cannot allow the use of public rights-of-way without value-based compensation, the Commission cannot preempt state law to allow use of the public rights-of-way without the payment of value-based compensation for the use of that public right-of-way.

V. ADDITIONAL REPLY COMMENTS ON CUSTOMER SERVICE STANDARDS AND THE PUCT

Commission Customer Service Obligations are enforceable by the PUCT and the PUCT may promulgate additional standards.

In the PUCT Comments, they expresses some concern over the status of "customer care and enforcement" issues.[50] The 2005 Texas Cable Franchising Statute provides that the Commission customer service standards would apply until customers can choose between two or more wire line providers.[51] However as noted in the initial Comments of TCFFUI, since July 1, 1993, the Commission customer service standards are required at a minimum to be as set out in the Commission Rule, 47

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[48] *Fleming v. Houston Lighting and Power,* 138 S.W. 2d 520, 143 S.W.2d 923 (Tex. 1940) the Texas Supreme Court upheld a 4% gross revenue fee as to an electric provider franchisee. *Fleming* cited the *City of St. Louis* as authority for collecting a value-based rental charge as compensation for use of the public streets. *See City of Dallas, Tex. v. F.C.C.*, 118 F.3d 393, 397-398 (5th Cir. 1997). In construing the cable 5% gross revenue franchise fee the court stated: "Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public right-of-ways. See, e.g., [Page 398] *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 13 S.Ct. 485, 37 L.Ed. 380 (1893) (noting that the fee paid to a municipality for the use of its rights-of-way were rent, not a tax)." See also Texas Constitutional prohibition against a "gift" of public property Texas Constitution, Article 3, Section 52. *See Pasadena Police Association v. Pasadena,* 497 S.W. 2d 388 (Tex. Civ. App. – Houston [1st Dist.] 1993).

[49] 47 U.S.C. § 542.

[50] PUCT Comments, page 3.

[51] Chapter 66, § 66.008.

C.F.R. § 76.309.[52] Additionally, under 47 U.S.C. Section 552 (a) the local franchising authority has the statutory right to "establish" and "enforce" customer service standards. Further 47 U.S.C. Section 552 (d) (1) states that "[n]othing in this subchapter shall be construed to prohibit a franchising authority from enacting or enforcing any consumer protection law, to the extent not preempted by this subchapter." Therefore the Commission should make it clear to the PUCT that they may, as the designated franchising authority in Texas, both continue to enforce the Commission standards, as set out in the Commission Rules of 47 C.F.R. § 76.309, and may promulgate additional standards consumer protection laws, consistent with 47 U.S.C. Section (a) and (d).

VI. CONCLUSION

TCCFUI urges the Commission to end this rulemaking as it is without jurisdiction or authority, as discussed above. However to the extent the Commission deems it has the authority, that it not further restrict, beyond what is in current federal law, the processes by which local governments, and now in Texas, the PUCT, awards a cable franchise. In the event the Commission deems it appropriate to delineate standards as to when and what constitutes an unreasonable refusal to award an additional competitive cable franchise, then those standards should be detailed strictly within the bounds of what is currently permitted and which the Commission tentatively concluded.[53] TCCFUI urges that whatever standards or requirements are established by the Commission, if any, that those standards or requirements must not undercut or diminish the standards set out in the state-issued franchise in Texas pursuant to the 2005 Texas Cable Franchising Statute. In fact, the standards and requirements in the 2005 Texas Cable Franchising Statute should be the minimal benchmarks to be preserved in regard to

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[52] The FCC customer standards may continue to apply due to federal preemption of the state law by the FCC rules, 47 C.F.R. § 76.309 (c). "Effective July 1, 1993, a cable operator shall be subject to the following customer service standards".

[53] Cable Franchising NPRM ¶ 20.

what requirements are to be met by a cable provider. TCCFUI welcomes the opportunity to submit these Reply Comments and looks forward to further dialogue with the Commission.

Respectfully submitted,

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EXHIBIT A

The 2005 Texas Cable Franchising Statute streamlines the Texas cable franchising process. [54]:

- No cable services may be provided without a state issued franchise unless there is an existing municipal franchise, which are "grandfathered" to continue until they expire. (Section 66.003(a)).
- An application for a cable franchise is filed with the PUCT and a franchise is to be granted within 17 business days of its filing. (Section 66.003(b)).
- In the application for a franchise, the applicant must agree to comply with applicable federal and state statues and regulations and the applicant agrees to comply with all applicable municipal regulations regarding the use and occupancy of the public rights-of-way, including the police powers of the municipality. (Section 66.003(b) (2)-(3)).
- The franchising certificate as issued by the PUCT is granted subject to the law of the state, including the police powers of the municipalities (Section 66.003(c) (2)).
- The franchise fee is standardized at 5% of the gross revenue, as defined in the statute. (Section 66.005(a))
- Municipal franchise fee compliance review of the provider's records is preserved. (Section 66.005(b))
- Public, educational, and governmental access channels ("PEG Channels") are grandfathered to the lower of existing activated channel levels or stated minimum number of PEG channels in cities without existing PEG channels as of September 1, 2005. (Section 66.009(a)-(c)).[55]

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[54] Citations are to the codified sections of CHAPTER 66, TEXAS UTILITY CODE.

[55] Three PEG Channels for Cities over 50,000 and two for cities under 50,000.

- An interconnection to provide distribution of PEG Access Channels is required and cannot be withheld by the incumbent provider. (Section 66.009(h)).
- PEG Channel capital contributions ("PEG Fees") are preserved at the existing per subscriber level paid by the incumbent cable provider until the incumbent's franchise expires and then each city may elect to accept a flat 1% of gross revenue fee or the prior per-subscriber fee that was in the expired franchise. (Section 66.006(a) and (b)).[56]
- Institutional network capacity and "free" cable drops to city and school facilities provided under franchises existing on September 1, 2005 are grandfathered until the expiration of the franchise or January 1, 2008, whichever is later. Thereafter these services are paid at the providers "actual incremental cost". (Section 66.006(b)).
- Municipal police powers to manage the public rights-of-way are expressly preserved. (Section 66.011(a)).
- A city may require a provider's map records to locate facilities and business records to verify compensation calculations. (Section 66.011(a) (2) and (3)).
- A city may require a construction permit. (Section 66.011 (b)).
- Build-out requirements are prohibited. (Section 66.007).
- FCC Customer service standards apply until customers can choose between two or more wire line providers. (Section 66.008)[57].
- A standardized indemnity provision applies. (Section 66.012).

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[56] Such percentage PEG fees have been expressly approved by the FCC in a staff letter opinion of June 25,1999, Cable Services Bureau Action Letter to City of Bowie, DA 99-1252, CSB-ILR 99-2 (1999 WL421044 (F.C.C.)), in part as they are separately authorized by the Cable Act in 47 U.S.C. § 531, 47 U.S.C. § 541 (a) (4) (B) and 47 U.S.C. § 544 (b) (1), as well as being expressly excluded from the definition of a "franchise fee" 47 U.S.C. § 542 (g) (2) (C).

[57] The FCC customer standards may continue to apply due to federal preemption of the state law by the FCC rules, 47 C.F.R. § 76.309 (c). "Effective July 1, 1993, a cable operator shall be subject to the following customer service standards".

- The PUCT has no authority to review cities' police power regulations. (Section 66.011(e) and Section 66.012(c)).
- A municipality may require registration of contact information for each local cable provider, and it may enact guidelines concerning use of PEG Channels. (Section 66.013(1)-(2)).
- Discrimination to potential residential subscribers based upon income is prohibited. (Section 66.014(a)).